STATE OF MICHIGAN

COURT OF APPEALS

MANISTEE COUNTY INTERMEDIATE SCHOOL BOARD, a/k/a MANISTEE COUNTY INTERMEDIATE SCHOOL DISTRICT, Plaintiff-Appellee,	UNPUBLISHED May 5, 2005
v	No. 252603 Mason Circuit Court
MASB-SEG PROPERTY CASUALTY POOL, INC., Defendant-Appellant.	LC No. 02-000220-CK

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's grant of summary disposition in favor of plaintiff. This case involves whether defendant had a duty to defend claims against plaintiff brought in an underlying suit. We affirm.

I. FACTS

This case involves the issue of whether defendant had a duty to defend plaintiff in underlying litigation. The underlying litigation arose when Huntington Leasing Company (Huntington) filed a lawsuit against MISB, Local Internet Services, Inc. (LIS), Mark A. Pehrson, P.C., Larry Kivela, and Robert Tilmann, who was the superintendent for the school district. While superintendent for the school district, Tilmann, on behalf of MISB, entered into an agreement with LIS to update and to improve internet equipment and services for the school district. In order to secure financing, Tilmann also entered into a lease agreement with Huntington for the internet equipment.

Tilmann entered into both of these agreements as superintendent of the school district, but neither agreement was approved by the school board. MISB paid the Huntington lease through LIS; MISB would pay LIS a monthly amount, and LIS would then pay the amount owed to Huntington. The school board members stated that they did not know that LIS was paying Huntington for an additional lease on the school's behalf. Eventually, Tilmann was replaced as superintendent, and MISB had a falling out with LIS. After agreeing on a buy-out amount, MISB stopped paying LIS for any of the contracts it previously had with LIS. This meant LIS

stopped paying Huntington also. After Huntington stopped receiving payments on the lease it had with MISB and learned that MISB claimed it did not know of the lease agreement between them, Huntington filed suit against the above-mentioned parties.[1] Huntington alleged that MISB had breached the lease agreement. Huntington also alleged that Tilmann and LIS fraudulently entered into the lease agreement with Huntington to cheat Huntington out of its money.

MISB had an errors and omissions policy with defendant. After Huntington filed suit against MISB, MISB requested that defendant provide it with a defense of the litigation. Defendant declined to defend MISB stating that the underlying suit was for a collection of a debt which was not covered under the policy, there was no coverage for allegations of fraud, and there was no coverage because MISB was alleging that Tilmann acted outside the scope of his authority as superintendent. Later on during the underlying litigation, MISB again requested that defendant defend it against the claims. Defendant again declined, stating the same reasons.

On May 14, 2002, MISB filed a declaratory suit against defendant to determine if defendant had a duty to defend it in the underlying litigation. Tilmann also filed a declaratory suit against defendant, requesting defendant provide him with a defense in the underlying suit. The two cases for declaratory relief were consolidated. On August 13, 2002, the court heard all parties' motions for summary disposition. The court granted summary disposition to Tilmann, finding that he was an insured under the policy. The court also granted summary disposition to MISB, and a stipulation and final order was entered on October 8, 2002. On November 20, 2003, the two cases were severed for purposes of appeal.

II. POLICY COVERAGE

Defendant first argues that the insurance policy between the parties did not provide coverage for the claims against plaintiff in the underlying action because they were breach of contract claims. Defendant also argues that two exceptions apply to the claims, precluding coverage.

A. Standard of Review

We review a trial court's ruling on a motion for summary disposition de novo. *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). Interpretation and construction of insurance contracts are also questions of law, which this Court reviews de novo. *Shefman v Auto-Owners Ins Co*, 262 Mich App 631, 636; 687 NW2d 300 (2004).

B. Analysis

An insurance company will have a duty to defend its insured "if the allegations of the underlying suit arguably fall within the coverage of the policy." *Royce v Citizens Ins Co*, 219

[1] Larry Kivela was an attorney in the law firm Mark A. Pehrson, P.C. and drafted an opinion letter regarding the legality of the lease agreement with Huntington.

Mich App 537, 543; 557 NW2d 144 (1996). Courts have described the duty to defend as follows:

> The duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. This duty is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even *arguably* come within the policy coverage. An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor. [*Protective National Ins Co of Omaha v Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991), quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980) (emphasis in *Detroit Edison*; citations omitted).]

An insurer's duty to defend is broader than its duty to indemnify. *Busch v Holmes*, 256 Mich App 4, 9; 662 NW2d 64 (2003). The duty to defend arises from the language of the insurance contract. *Michigan Education Employees Mut Ins Co v Turow*, 242 Mich App 112, 117; 617 NW2d 725 (2000). In determining if there is a duty to defend, courts are guided by established principles of contract construction. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). Courts are to look to the language of the policy and construe terms to determine the scope of coverage provided by the contract. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 138; 610 NW2d 272 (2000). The contract is to be read as a whole, and meaning is to be given to all terms within the policy. *Id*. The court should give language its plain and ordinary meaning to avoid technical and strained constructions. *Id*. If a contract is unambiguous, the court is to enforce it as written. *Id*. at 139.

The insurance policy at issue in this case provided a duty to defend any action or suit alleging a wrongful act. Wrongful act was defined as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the performance of the duties for the School District named in the Original Declarations." The trial court found that the claim against plaintiff for breach of contract in the underlying case was a wrongful act because it was a breach of duty. We agree.

The insurance policy does not define breach of duty. Because it is not defined in the policy, breach of duty should be given its ordinary and plain meaning. *Radenbaugh*, *supra* at 138. To ascertain the precise meaning of a term, courts may refer to dictionary definitions. *Morinelli v Provident Ins Co*, 242 Mich App 255, 263; 617 NW2d 777 (2000). Black's Law Dictionary (7th ed) defines breach of duty as "[t]he violation of a legal or moral obligation." Duty is defined as "[a] legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right" and legal duty is defined as "[a] duty arising by contract or by operation of law; an obligation the beach of which would be a legal wrong." *Id*. A contract gives a party an obligation to do a certain thing, or a

duty, and a breach of the contract would be a violation of that duty. The claim for breach of contract fits squarely in the ordinary definition of breach of duty.

Additionally, the breach of contract in the underlying case arose from non-disclosure of a lease agreement to plaintiff by the former superintendent of the school district. This omission caused plaintiff to be unknowingly liable on a lease agreement and unknowingly breach the lease agreement. This type of non-disclosure or omission falls within the coverage of the insurance policy. Therefore, we find that the insurance policy covered the claim at issue in the underlying litigation.

III. EXCEPTIONS

Defendant next argues that even if the policy provides coverage, coverage is precluded because the claim falls under an exception in the policy for claims involving fraud and an exception for claims involving the gaining of a personal profit the insured is not entitled to receive. We disagree.

A. Standard of Review

Courts are to construe exclusionary clauses strictly in favor of the insured. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). However, coverage under a policy will be lost if an exclusion applies to particular claims of the insured. *Id*. "Clear and specific exclusions must be given effect." *Id*. An insurance company should not be held liable for a risk that it did not assume. *Allstate Ins Co v Fick*, 226 Mich App 197, 201; 572 NW2d 265 (1997).

B. Analysis

In this case, although it was initially alleged that there was fraud involved in the procurement of the lease agreement, the allegation was never proven, and all claims involving fraud were dismissed from the underlying litigation. The insurance policy states that if allegations of fraud are not substantially proven, the insured will be reimbursed for all amounts that would have been collectable under the policy. Fraud was not substantially proven and therefore, under the policy itself, defendant would have to reimburse plaintiff for the defense and once the fraud count was dismissed from the lawsuit, take on the duty to defend. Additionally, there was no evidence presented in the underlying claim that the superintendent or plaintiff received a personal benefit under the lease agreement that it was not entitled to receive. Therefore, we find that neither of the exceptions apply in this case.

IV. DISCOVERY

Defendant, in its brief, argued that the trial court erred in concluding that the superintendent who entered into the lease agreement was acting on behalf of the school and in

making this conclusion before discovery was completed. However, at oral argument, the parties agreed that this is no longer an issue given the stipulation and final order.[2]

Affirmed.

/s/ Karen Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette

[2] The stipulation and final order is an agreement between the parties regarding the resolution of this case depending upon which party is successful on appeal.